Supreme Court, U.S.
FILED
SEP 22 2003
OFFICE OF THE CLERK

No. 02-9410

In the Supreme Court of the United States

MICHAEL D. CRAWFORD, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

SRI SRINIVASAN
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Confrontation Clause imposes a categorical prohibition against the admission of hearsay statements that are testimonial in nature.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Constitutional provison involved	2
Statement	2
Summary of argument	5
Argument:	
The Confrontation Clause does not impose a categorical prohibition against the admission of the out-of-court testimonial statements of an unavailable witness	6
A. The Confrontation Clause governs the admissibility of out-of-court statements only when the statements are testimonial in nature	8
1. A declarant acts as a "witness against" the defendant within the meaning of the Confrontation Clause when giving testimony or its equivalent	9
2. The historical basis of the right of confronta- supports limiting the Confrontation Clause to testimonial hearsay	10
3. The assumption in *Roberts* that the Confrontation Clause is coextensive with the hearsay rules is unsupported by the evolution of hearsay law and the confrontation right	12
B. The Confrontation Clause does not bar the admission of testimonial hearsay when the witness is unavailable to testify and the statement is inherently reliable	17
1. The Court has rejected a categorical rule when construing the right of confrontation and other rights protected by the Sixth Amendmen	18

Table of Contents—Continued: Page

2. A categorical rule of inadmissibility would conflict with the objective of the Confrontation Clause to promote the truth-seeking function of criminal trials 21
Conclusion 28

TABLE OF AUTHORITIES

Cases:

Barber v. *Page*, 390 U.S. 719 (1968) 14, 16
Berger v. *California*, 393 U.S. 314 (1969) 14
Bourjaily v. *United States*, 483 U.S. 171 (1987) 7, 15, 18
Bridges v. *Wixon*, 326 U.S. 135 (1945) 14
Brookhart v. *Janis*, 384 U.S. 1 (1966) 14, 16
Bruton v. *United States*, 391 U.S. 123 (1968) 14, 16
California v. *Green*, 399 U.S. 149 (1970) 8, 14, 19, 24
Calvert v. *Wilson*, 288 F.3d 823 (6th Cir. 2002) 16-17
Chambers v. *Mississippi*, 410 U.S. 284 (1973) 18, 21
Cook v. *McKune*, 323 F.3d 825 (10th Cir. 2003) 16
Coy v. *Iowa*, 487 U.S. 1012 (1988) 10, 19
Delaney v. *United States*, 263 U.S. 586 (1924) 14
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 19
Diaz v. *United States*, 223 U.S. 442 (1912) 14
Douglas v. *Alabama*, 380 U.S. 415 (1965) 14, 16
Dowdell v. *United States*, 221 U.S. 325 (1911) 14
Dutton v. *Evans*, 400 U.S. 74 (1970) 8, 14, 21, 24, 25
Idaho v. *Wright*, 497 U.S. 805 (1990) 7, 10, 15, 16, 23, 24, 25
Kentucky v. *Stincer*, 482 U.S. 730 (1987) 22
Kirby v. *United States*, 174 U.S. 47 (1899) 14
Lee v. *Illinois*, 476 U.S. 530 (1986) 15, 16, 22, 25, 26
Lilly v. *Virginia*, 527 U.S. 116 (1999) 7, 15, 16, 22, 25
Mancusi v. *Stubbs*, 408 U.S. 204 (1972) 14, 24, 25

Cases—Continued: Page

Maryland v. *Craig*, 497 U.S. 836 (1990) 9, 18, 19, 20, 21, 22
Mattox v. *United States*, 156 U.S. 237 (1895) 12, 14, 15, 18, 23, 24
McCandless v. *Vaughn*, 172 F.3d 255 (3d Cir. 1999) 17
Michigan v. *Lucas*, 500 U.S. 145 (1991) 21
Mickens v. *Taylor*, 535 U.S. 162 (2002) 20
Motes v. *United States*, 178 U.S. 458 (1900) 14, 16
Ohio v. *Roberts*, 448 U.S. 56 (1980) 5, 6, 15, 17, 24, 25, 27
Padilla v. *Terhune*, 309 F.3d 614 (9th Cir. 2002) 16
Patton v. *Freeman*, 1 N.J.L. 113 (N.J. 1791) 13
Perry v. *Leeke*, 488 U.S. 272 (1989) 20
Pointer v. *Texas*, 380 U.S. 400 (1965) 13-14, 16
Reynolds v. *United States*, 98 U.S. 145 (1878) 14
Roberts v. *Russell*, 392 U.S. 293 (1968) 14, 16
Robertson v. *Baldwin*, 165 U.S. 275 (1897) 14
Ryan v. *Miller*, 303 F.3d 231 (2d Cir. 2002) 16
Salinger v. *United States*, 272 U.S. 542 (1926) 12
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 14, 18-19
Taylor v. *Illinois*, 484 U.S. 400 (1988) 20, 21
Tennessee v. *Street*, 471 U.S. 409 (1985) 6, 21, 24
United States v. *Cronic*, 466 U.S. 648 (1984) 20
United States v. *Hubbell*, 530 U.S. 27 (2000) 9
United States v. *Inadi*, 475 U.S. 387 (1986) 15, 21-22
United States v. *Scheffer*, 523 U.S. 303 (1998) 27
United States v. *Westmoreland*, 240 F.3d 618 (7th Cir. 2001) 17
White v. *Illinois*, 502 U.S. 346 (1992) 1, 8, 9, 13, 16, 24

Constitutjon and rule:

U.S. Const. Amend. VI 6, 8, 9, 10, 12, 17, 18, 20
Compulsory Process Clause 20, 21
Confrontation Clause ..... *passim*

Rule—Continued:	Page
Fed. R. Evid. 806	26
Miscellaneous:	
3 W. Blackstone, *Commentaries on the Law of England* (1768)	13
9 W. Holdsworth, *History of the English Law* (1926)	10, 11
D. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381 (1959)	10, 11, 12
1 B. Schwartz, *The Bill of Rights: A Documentary History* (1971)	12
1 J. Stephen, *A History of the Criminal Law of England* (1883)	11
J. Story, *Commentaries on the Constitution of the United States* (1833)	12
2 N. Webster, *An American Dictionary of the English Language* (1828)	9
J. Wigmore, *Evidence* (Chadbourne rev. ed. 1974):	
Vol. 3	13
Vol. 5	10, 11-12, 13, 14, 24

In the Supreme Court of the United States

No. 02-9410

MICHAEL D. CRAWFORD, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question, *inter alia*, whether the Confrontation Clause imposes a categorical prohibition against the admission of hearsay statements that are testimonial in nature. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case. The United States, in its brief as amicus curiae in *White* v. *Illinois*, 502 U.S. 346 (1992), argued that this Court should adopt an approach that limits application of the Confrontation Clause to out-of-court statements that constitute testimony or its functional equivalent. The United States argues in this case that, as to such testimonial statements, the Confrontation Clause does not impose an absolute rule of inadmissibility.

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

STATEMENT

1. On August 5, 1999, petitioner stabbed Richard Rubin Kenneth Lee at Lee's apartment. Petitioner's wife, Sylvia Crawford, was with him at the time. Later that evening, police arrested petitioner and Sylvia and interrogated them separately. Petitioner and Sylvia each gave a tape-recorded statement describing the circumstances of the stabbing, and then gave a second tape-recorded statement several hours later. J.A. 2-3.

In their initial statements, petitioner and Sylvia both told the officers that Lee had invited them to his apartment earlier in the day, and that, at some point during the evening, petitioner left the apartment to purchase alcohol. Both petitioner and Sylvia said that, upon returning to the apartment, petitioner found Lee making sexual advances toward Sylvia, and petitioner stabbed Lee in an ensuing altercation. J.A. 3, 20-21.

In their second statements, petitioner and Sylvia gave a different account of the events. Both said that Lee had sexually assaulted Sylvia several weeks beforehand rather than on the evening of the stabbing, and that they went to find Lee after petitioner became angry upon the mention of Lee's name. Both also stated that Sylvia directed petitioner to Lee's apartment, and that, after the three spoke for a short time, petitioner stabbed Lee. J.A. 3, 21.

Petitioner, when asked whether he had seen anything in Lee's hands, indicated that he thought Lee had

reached for an object "right before everything happened. He was like reachin', fiddlin' around down here and * * * this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut." J.A. 18. Sylvia, after being asked whether Lee fought back from the assault, stated that Lee "lifted his hand over his head maybe to strike [petitioner's] hand down or something and then * * * put his right hand in his right pocket . . . took a step back . . . [Petitioner] proceeded to stab him . . . then his hands were like * * * open arms . . . with his hands open and he fell down." J.A. 16. Sylvia said that she did not see anything in Lee's hands when he held them open. J.A. 17. Sylvia also told the officers that petitioner was "infuriated" and "past tipsy" and had said before the incident that Lee "deserve[d] a ass whoopin." J.A. 14.

2. a. Petitioner was charged with attempted first degree murder and first degree assault. At trial, petitioner took the stand and argued that he acted in self-defense. He invoked his marital privilege under state law to prevent Sylvia from testifying against him. J.A. 3.[1]

The State sought to offer Sylvia's second tape-recorded confession in its case-in-chief as evidence rebutting petitioner's claim of self-defense. Petitioner objected, arguing that admission of the statement would violate his rights under the Confrontation Clause. The trial court overruled petitioner's objection and admitted Sylvia's second statement. The State also introduced Sylvia's first statement for the non-hearsay pur-

---

[1] Under Washington law, a spouse can prevent the other spouse from testifying by declining to consent to the testimony. See J.A. 4, 6, 22.

pose of showing that petitioner and Sylvia initially lied to officers. The jury ultimately found petitioner guilty on the assault charge. J.A. 3-4, 11-12.

b. The Washington Court of Appeals reversed, concluding that admission of Sylvia's second statement violated the Confrontation Clause. J.A. 20-37. The court rejected the State's argument that the similarity between petitioner and Sylvia's second statements rendered Sylvia's confession sufficiently reliable to permit its admission. In the court's view, the statements "differ regarding whether Lee was armed when [petitioner] stabbed him," in that petitioner's statement "asserts that Lee may have had something in his hand" whereas Sylvia's statement "has Lee grabbing for something only after he has been stabbed." J.A. 32.

c. The Supreme Court of Washington reversed and reinstated the jury verdict. J.A. 2-19. The court explained that, "[b]ecause a codefendant's confession is presumed unreliable, the statement must either meet a firmly rooted exception to the hearsay rule or provide some indicia of reliability, such as interlocking with the defendant's own confession." J.A. 15 (footnotes omitted). The court concluded that petitioner and Sylvia's second statements "overlap[ped]" and were not "contradictory," J.A. 17, because both statements "indicate that Lee was possibly grabbing for a weapon, but * * * are equally unsure when this event may have taken place," J.A. 18. "Because [the] statements are virtually identical," the court reasoned, "admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause." J.A. 18-19 (emphasis omitted).

SUMMARY OF ARGUMENT

This Court's current approach to determining the admissibility of an out-of-court statement under the Confrontation Clause presupposes that the Clause restricts the admissibility of any out-of-court statement offered as hearsay, that is, to prove the truth of the matter asserted. See *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). That framework should be reconsidered. The Confrontation Clause should be confined to statements that are testimonial in nature, such as former testimony, affidavits, or confessions to law enforcement officers.

That understanding accords with the constitutional text, which grants the accused a right to confront the "witnesses against" him. That language is most naturally read as addressed to individuals who give formal testimony or its functional equivalent. Restricting the Confrontation Clause to testimonial hearsay also accords with the historical roots of the confrontation right, which was established to end the practice of obtaining criminal convictions through admission of *ex parte* affidavits untested by cross-examination. Limiting the reach of the Confrontation Clause to testimonial hearsay would preserve its role in controlling the admissibility of the types of statements at issue in the vast majority of this Court's decisions applying the Clause.

Petitioner errs in contending that, if the Court restricts the reach of the Confrontation Clause to testimonial hearsay, the Clause should be construed to impose a per se rule barring admission of such statements. From its first decisions applying the Confrontation Clause, the Court has refused to adopt a categorical ban on admissibility, and has recognized that the

right of confrontation must give way when necessary to advance the reliability of the fact-finding process. In circumstances in which testimonial hearsay carries inherent guarantees of reliability and the declarant is unavailable to testify at trial, preventing the fact-finder from hearing the out-of-court statement would subvert the truth-seeking purpose of the Confrontation Clause. Moreover, because a finding of reliability presumes that cross-examination would be of marginal utility, admission of the out-of-court statement does not infringe the defendant's protected interests. This Court has held that other Sixth Amendment rights must yield on occasion in service of the objective of promoting reliability in the outcome of criminal trials. The Court should construe the right of confrontation no differently.

ARGUMENT

THE CONFRONTATION CLAUSE DOES NOT IMPOSE A CATEGORICAL PROHIBITION AGAINST ADMISSION OF THE OUT-OF-COURT TESTIMONIAL STATEMENTS OF AN UNAVAILABLE WITNESS

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), this Court formulated a "general approach" to Confrontation Clause review of hearsay statements. *Id.* at 65.[2] Under that approach:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.

[2] The Confrontation Clause imposes no restrictions against the admission of out-of-court statements for non-hearsay purposes. See *Tennessee* v. *Street*, 471 U.S. 409 (1985).

> Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66; see, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116, 124-125 (1999) (plurality opinion); *Idaho* v. *Wright*, 497 U.S. 805, 814-815 (1990); *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987). In this case, the Supreme Court of Washington, applying the *Roberts* framework, assessed whether Sylvia's second "statement contains a sufficient indicia of reliability to satisfy the confrontation clause." J.A. 13.

Petitioner asserts that the Confrontation Clause precludes any such inquiry into reliability, by erecting a categorical bar against the admission of "testimonial" hearsay such as depositions, prior testimony, or confessions to law enforcement officers. That argument has two elements. First, petitioner contends that the Confrontation Clause pertains solely to out-of-court statements that are testimonial in nature, because a person who makes a non-testimonial statement is not acting as a "witness against" the defendant within the meaning of the Clause. Second, petitioner contends that, as to testimonial statements, the Confrontation Clause establishes an absolute rule of inadmissibility, even if the statements are reliable and there is no other way to obtain the witness's testimony.

The government agrees that the term "witnesses against" in the Confrontation Clause pertains solely to live witnesses and to out-of-court declarants who provide the functional equivalent of testimony. The gov-

ernment made essentially the same submission as amicus curiae in *White* v. *Illinois*, 502 U.S. 346 (1992), which involved a Confrontation Clause challenge to the admission of certain non-testimonial hearsay. Although the Court rejected that submission (see *id.* at 352-353), the government renews it in this case in view of the Court's grant of certiorari on the question whether the *Roberts* framework warrants reconsideration.

The government parts company with petitioner on the second element of his argument. The suggestion that the Confrontation Clause imposes a per se bar against the admission of testimonial hearsay is inconsistent with numerous decisions of this Court confirming that the confrontation right is not absolute, with the basic purpose of the Confrontation Clause to promote reliability and accuracy in criminal trials, and with the approach of this Court in other Sixth Amendment contexts. Accordingly, the Washington Supreme Court correctly declined to rule that Sylvia's tape-recorded confession was per se inadmissible.

A. The Confrontation Clause Governs The Admissibility Of Out-Of-Court Statements Only When The Statements Are Testimonial In Nature

The assumption in *Roberts* that all hearsay is subject to scrutiny under the Confrontation Clause appears born of a view that the Confrontation Clause accommodates only two polar interpretations—one that would confine the term "witnesses against" to persons who actually testify at trial, and the other that would construe those words to encompass any hearsay declarant whose statement is offered at trial. See *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970) (Harlan, J., concurring); *California* v. *Green*, 399 U.S. 149, 172-189 (1970) (Harlan, J., concurring). But the language, viewed in historical

context, supports an intermediate interpretation, under which the Clause applies to those individuals who provide in-court testimony or its functional equivalent —*i.e.*, affidavits, depositions, prior testimony, or formal statements to law enforcement officers, including the accomplice confession at issue in this case.

1. A declarant acts as a "witness against" the defendant within the meaning of the Confrontation Clause when giving testimony or its equivalent

By its terms, the Confrontation Clause pertains only to statements made by "witnesses against" a defendant. At the time the Sixth Amendment was adopted, as now, a "witness" was understood to be "one who gives testimony" or "testifies"—that is, "[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." *Maryland* v. *Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (quoting 2 N. Webster, *An American Dictionary of the English Language* 113 (1828)).

The word "witness," in the abstract, can also refer to any person who observed an event. But that is not the sense in which the term is used in the Sixth Amendment. Persons who merely observe matters pertinent to a criminal prosecution do not become "witnesses against" the defendant unless and until they convey their observations in the form of testimony or its functional equivalent. See *White*, 502 U.S. at 360 (Thomas, J., concurring in part and concurring in the judgment) (quoting *Craig*, 497 U.S. at 864-865 (Scalia, J., dissenting)). Cf. *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000) ("The word 'witness' in the constitutional text [of the Fifth Amendment privilege against com-

pelled self-incrimination] limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character.").

Indeed, the law of evidence authorizes the admission of certain non-testimonial declarations, such as excited utterances, dying declarations, and co-conspirator statements, precisely because they are given under circumstances fundamentally different from those surrounding testimony by a "witness." Such statements are unlikely to be influenced by the declarant's calculation of their implications for a future trial. See *Wright*, 497 U.S. at 820. As a result, they are not made in the declarant's capacity as a "witness" for purposes of the Sixth Amendment.

2. The historical basis of the right of confrontation supports limiting the Confrontation Clause to testimonial hearsay

a. Interpreting the Confrontation Clause to apply solely to testimonial hearsay is consistent with the Clause's historical roots. Although the concept of confrontation dates to Roman times (see *Coy* v. *Iowa*, 487 U.S. 1012, 1015-1016 (1988)), the common-law right to confrontation first emerged only in the 16th century. Juries rarely heard witnesses before that time, instead obtaining information "by consulting informed persons not called into court." 5 J. Wigmore, *Evidence* § 1364, at 13 (Chadbourne rev. ed. 1974); see D. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 386-387 (1959). By the end of the 16th century, it had become common for the Crown to offer evidence in criminal proceedings, 9 W. Holdsworth, *History of the English Law* 224 (1926), but still not through presentation of live testimony.

A trial was preceded by an investigation conducted by examining magistrates, who interrogated the prisoner, any accomplices, and other persons with relevant information. See 1 J. Stephen, *A History of the Criminal Law of England* 221, 325 (1883). The prisoner had no right to be present during those pre-trial examinations. *Id.* at 221. The ensuing trial consisted principally of the presentation of argument between the prisoner and the prosecutor. 9 W. Holdsworth, *supra*, at 225; see 1 J. Stephen, *supra*, at 325-326. There was no requirement for the prosecution to rely on live testimony. To the contrary, in courts of common law, "[t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.*, the witnesses against him, brought before him face to face." 1 J. Stephen, *supra*, at 326; see 9 W. Holdsworth, *supra*, at 228. In the Star Chamber, similarly, "[t]he evidence of witnesses was given upon affidavit." 1 J. Stephen, *supra*, at 338.[3]

b. The right of confrontation emerged to put an end to such practices. Although it is uncertain precisely when the right was formally recognized, the practice of requiring the introduction of testimony through live witnesses rather than depositions and affidavits was well established by the mid-1600s. See D. Pollitt, *supra*, 8 J. Pub. L. at 389-390; 5 J. Wigmore, *supra*,

---

[3] The trial of Sir Walter Raleigh for treason in 1603 presents a notorious example. The crucial evidence against Raleigh included the deposition of one Cobham as well as a letter later written by Cobham, both of which implicated Raleigh in a plot to seize the throne. Raleigh had obtained a written retraction from Cobham and believed that Cobham would testify in his favor at trial. The court nevertheless rejected Raleigh's demand that Cobham be called as a witness. See D. Pollitt, *supra*, 8 J. Pub. L. at 388-389.

§ 1364, at 23 n.47. In this country, a number of state constitutions adopted after the Declaration of Independence recognized a right of confrontation.[4] The Sixth Amendment's Confrontation Clause appears patterned after those provisions.

The history of the Confrontation Clause thus supports Justice Story's observation that the Clause simply codified the common-law right that had been recognized in England, and "follow[ed] out the established course of the common law in all trials for crimes." J. Story, *Commentaries on the Constitution of the United States* 664 (1833). This Court has drawn the same conclusion:

> The right of confrontation did not originate with the provision of the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court has often said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.

Salinger v. *United States*, 272 U.S. 542, 548 (1926); accord, *Mattox* v. *United States*, 156 U.S. 237, 243 (1895).

3. The assumption in* Roberts *that the Confrontation Clause is coextensive with the hearsay rules is unsupported by the evolution of hearsay law and the confrontation right

a. The right of confrontation is a feature of criminal procedure intended to benefit criminal defendants. The hearsay rule, by contrast, is a feature of evidence law applicable to all litigants in both civil and criminal

[4] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 342, 377 (1971) (Va., Pa., Del., Md., N.C., Vt., Mass., N.H.); D. Pollitt, *supra*, 8 J. Pub. L. at 397-399.

proceedings. The "appreciation of the impropriety of using hearsay statements" took increasing hold in England during the 17th century; and by the early 18th century, the general prohibition against admitting hearsay declarations "receive[d] a fairly constant enforcement." 5 J. Wigmore, *supra*, § 1364, at 18. From the outset, however, the hearsay rule was subject to well-recognized (and enduring) exceptions.[5] There is "little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation." *White*, 502 U.S. at 362 (Thomas, J., concurring in part and concurring in the judgment).

b. The decisions of this Court and other courts before *Roberts* did not support the notion that the Confrontation Clause regulates the admissibility of all hearsay declarations. The development of the hearsay rule in state and federal decisions has been marked by the recognition of exceptions authorizing the admission of out-of-court statements regardless of the declarant's availability. Before the Confrontation Clause applied to the States as incorporated through the Fourteenth Amendment, see *Pointer* v. *Texas*, 380 U.S. 400, 403-

[5] At least the following exceptions had taken shape by the late 18th century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence. See *Patton* v. *Freeman*, 1 N.J.L. 113, 115 (N.J. 1791) (co-conspirator declarations); 5 J. Wigmore, *supra*, § 1430, at 275 (dying declarations); *id.* § 1518, at 426-428 (regularly kept records); *id.* § 1476, at 350 (declarations against interest by deceased persons); *id.* § 1476, at 352-358 (statements of fact against penal interest); *id.* § 1480, at 363 (pedigree and family history); *id.* § 1580, at 544 (reputation evidence); 3 J. Wigmore, *supra*, § 735, at 78-84 (past recollection recorded). See also 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).

406 (1965), the constitution of virtually every State contained a provision substantially equivalent to the Clause. 5 J. Wigmore, *supra*, § 1397, at 155-158 n.1. Many state decisions had rejected claims that the admission of out-of-court statements under exceptions to the hearsay rule violated those state constitutional provisions. See *id.* § 1397, at 159-162.

Until *Roberts*, this Court's cases likewise provided no basis for such a contention. All but two of the Court's decisions applying the Confrontation Clause to hearsay declarations involved prior testimony or confessions—statements functionally equivalent to those that fueled recognition of the common-law right to confrontation.[6] The remaining two decisions held that the admission of statements by co-conspirators in furtherance of the conspiracy did not violate the Confrontation Clause.[7]

---

[6] See *Reynolds* v. *United States*, 98 U.S. 145, 158-161 (1878) (testimony at a prior trial); *Mattox*, 156 U.S. at 240-244 (same); *Motes* v. *United States*, 178 U.S. 458, 471-474 (1900) (testimony at "preliminary trial"); *Pointer* v. *Texas*, 380 U.S. at 406-408 (preliminary hearing testimony); *Douglas* v. *Alabama*, 380 U.S. 415, 418-420 (1965) (co-defendant's confession to police); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) (same); *Barber* v. *Page*, 390 U.S. 719, 722-725 (1968) (preliminary hearing testimony); *Berger* v. *California*, 393 U.S. 314 (1969) (same); *Bruton* v. *United States*, 391 U.S. 123, 126-128 & n.3 (1968) (codefendant's confession); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (same); *Green*, *supra* (preliminary hearing testimony and statement to police officer); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972) (prior testimony). See also *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897); *Kirby* v. *United States*, 174 U.S. 47, 54-61 (1899); *Dowdell* v. *United States*, 221 U.S. 325, 329-330 (1911); *Diaz* v. *United States*, 223 U.S. 442, 449-452 (1912); *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); *Bridges* v. *Wixon*, 326 U.S. 135, 153-154 (1945).

[7] *Dutton*, 400 U.S. at 74; *Delaney* v. *United States*, 263 U.S. 586, 590 (1924).

Accordingly, nothing in this Court's cases suggested that the Confrontation Clause was applicable to all out-of-court statements.

The view that the Confrontation Clause limits the admissibility of *all* hearsay gained currency in this Court with the "general approach" adopted in *Roberts*, 448 U.S. at 65. The hearsay at issue there, however, as in many of the Court's previous Confrontation Clause cases, was the preliminary hearing testimony of a witness who could not be found at the time of trial. The Court upheld admission of the testimony because it had been "tested with the equivalent of significant cross-examination" and the witness was unavailable to give testimony at trial. *Id.* at 70, 77. The facts of *Roberts* therefore did not require formulation of a test governing the admissibility of out-of court statements other than the kind to which the Confrontation Clause had long been applied. See, *e.g.*, *Mattox*, 156 U.S. at 242 244. The Court observed that "[t]he historical evidence leaves little doubt * * * that the Clause was intended to exclude *some* hearsay," 448 U.S. at 63 (emphasis added), but articulated an approach that reached *all* hearsay, *id.* at 65-66.

c. The *Roberts* framework has been regularly invoked in subsequent cases raising Confrontation Clause challenges, but for the most part, as in *Roberts*, without considering whether its reach squares with the term "witnesses against" in the text of the Clause. See *Lilly*, 527 U.S. at 124-125 (plurality opinion); *Wright*, 497 U.S. at 814-815; *Bourjaily*, 483 U.S. at 181-184; *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986); *United States* v. *Inadi*, 475 U.S. 387, 392-394 (1986).[8] The sole exception

---

[8] *Lilly* and *Lee* involved accomplice statements to the police, and *Bourjaily* and *Inadi* involved co-conspirator statements. The

is *White* v. *Illinois*, *supra*, in which the Court rejected the argument of the United States as amicus curiae that the words "witnesses against" limit the Confrontation Clause to testimonial hearsay. 502 U.S. at 352-353. The Court reasoned that construing the Clause in that manner would "virtually eliminate its role in restricting the admission of hearsay testimony." *Id.* at 352; see *Lilly*, 527 U.S. at 124 (plurality opinion).

Excluding non-testimonial hearsay from the reach of the Confrontation Clause, however, would leave wholly intact the role of the Clause in controlling the admission of former testimony and testimonial statements to police by accomplices and witnesses—precisely the type of hearsay at issue in the vast majority of the Court's Confrontation Clause decisions addressing the admissibility of out-of-court statements. See notes 6-8, *supra*. The suggested approach thus would not affect the holding in several of those cases that the admission of testimonial hearsay violated the Clause.[9] By

---

only case after *Roberts* in which the Court arguably applied the framework to exclude non-testimonial hearsay is *Wright*. There, however, the Court did not address whether the child declarant was acting as a witness when she made the excluded statements to a pediatrician. Moreover, the questioning occurred after the declarant had been taken into custody by police, and the state court's characterization of the questioning suggests that it was designed to develop evidence for a criminal case. See 497 U.S. at 813.

[9] See *Motes*, 178 U.S. at 471-474; *Pointer*, 380 U.S. at 406-408; *Douglas*, 380 U.S. at 418-420; *Brookhart*, 384 U.S. at 4; *Barber*, 390 U.S. at 722-725; *Bruton*, 391 U.S. at 126-128; *Roberts* v. *Russell*, *supra*; *Lee*, 476 U.S. at 544-546; *Lilly*, 527 U.S. at 139. Likewise, the federal courts of appeals have held that the admission of particular testimonial hearsay violated the defendant's confrontation rights. See, *e.g.*, *Cook* v. *McKune*, 323 F.3d 825 (10th Cir. 2003); *Padilla* v. *Terhune*, 309 F.3d 614, 617-618 (9th Cir. 2002); *Ryan* v. *Miller*, 303 F.3d 231 (2d Cir. 2002); *Calvert* v. *Wilson*, 288 F.3d 823

contrast, with the arguable exception of *Wright* (see note 8, *supra*), the Court has yet to find any violation of the Clause in the admission of non-testimonial hearsay. For those reasons, the Court should reconsider its rejection in *White* of an approach confining Confrontation Clause review to hearsay that constitutes testimony or its functional equivalent.

B. The Confrontation Clause Does Not Bar The Admission Of Testimonial Hearsay When The Witness Is Unavailable To Testify And The Statement Is Inherently Reliable

Petitioner acknowledges that, if this Court continues to apply the Confrontation Clause to *all* hearsay statements, the Clause cannot plausibly be read to establish an absolute rule of inadmissibility. See Pet. Br. 42-50. Any such approach "would abrogate virtually every hearsay exception." *Roberts*, 448 U.S. at 63. The Confrontation Clause could no more be read to impose a per se rule of inadmissibility if the Court were (correctly) to confine the Clause to testimonial hearsay. The language on which that interpretation rests—"witnesses against"—speaks solely to the type of statements encompassed by the Clause, not to whether the Clause categorically bars the admission of those statements.

Petitioner relies on language providing that the accused "shall enjoy the right" to confront adverse witnesses, U.S. Const. Amend. VI, and contends (Pet. Br. 34-35) that the right is "unconditional" because the terms admit of "no qualifications or exceptions." That argument lacks merit. This Court has consistently held

---

(6th Cir. 2002); *United States* v. *Westmoreland*, 240 F.3d 618, 627 (7th Cir. 2001); *McCandless* v. *Vaughn*, 172 F.3d 255, 264-270 (3d Cir. 1999).

that the right of confrontation, like other rights established by the Sixth Amendment, must give way when necessary to vindicate the overriding interest in promoting reliability and accuracy in criminal trials.

1. The Court has rejected a categorical rule when construing the right of confrontation and other rights protected by the Sixth Amendment

a. This Court has made clear, both before and after *Roberts*, that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). Consequently, rather than adopting a categorical rule of inadmissibility, the Court has "attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily*, 483 U.S. at 182.

Indeed, the Court explained in one of its earliest decisions applying the Confrontation Clause that, while there "is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards," "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243. The Court has not wavered from that understanding. See, *e.g.*, *Craig*, 497 U.S. at 847 ("[T]he [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial."); *Snyder* v. *Massachusetts*, 291

U.S. 97, 107 (1934) ("[T]he privilege of confrontation [has not] at any time been without exceptions," and those exceptions "are not even static, but may be enlarged from time to time."). Simply put, the "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." *Coy*, 487 U.S. at 1020.[10]

Maryland v. *Craig*, *supra*, confirms the Court's continued rejection of a categorical approach. That case involved the "core" right guaranteed by the Confrontation Clause, that of "face-to-face confrontation" of an adverse witness. 497 U.S. at 847 (quoting *Green*, 399 U.S. at 157). The question was whether a State could permit the testimony of an alleged child abuse victim by one-way closed circuit television when found necessary to protect the child from the trauma of a face-to-face encounter with the defendant. The Court reiterated that the confrontation right is "not absolute," and held that the defendant may be denied face-to-face confrontation where "necessary to further an important public policy" and "where the reliability of the testimony is otherwise assured." *Id.* at 850. The Court thus concluded that the State's interest in protecting child abuse victims from emotional trauma "may be sufficiently important" in certain cases "to outweigh * * * a defendant's right to face his or her accusers in court." *Id.* at 853; see *id.* at 857.

---

[10] Petitioner's argument for a categorical approach to the right of confrontation is also inconsistent with the recognition that trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

b. Petitioner's call for a categorical rule of inadmissibility under the Confrontation Clause is incompatible with the Court's approach when construing other procedural rights secured by the Sixth Amendment. See *Craig*, 497 U.S. at 850 (reconciling interpretation of Confrontation Clause with decisions construing "other Sixth Amendment rights"). For instance, the Court's application of the Sixth Amendment right to counsel is grounded in the understanding that the "right has been accorded * * * 'not for its own sake,'" *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) (quoting *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)), but for its implications for the reliability of criminal trials. Accordingly, the right is not absolute in all contexts. In *Perry* v. *Leeke*, 488 U.S. 272 (1989), the Court found no constitutional violation when the defendant was denied access to his counsel during a recess between his direct testimony and cross-examination. The Court explained that "cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." *Id.* at 282.

Of particular significance, the Court has declined to adopt a categorical approach when interpreting the right to obtain the testimony of a favorable witness under the Compulsory Process Clause—the complement to the right to cross-examine an adverse witness under the Confrontation Clause. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), the Court rejected a Compulsory Process Clause challenge to the exclusion of a witness's testimony as a sanction for failing to identify the witness in a pretrial discovery request. The Court explained that "the mere invocation of [the compulsory process] right cannot automatically and invariably

outweigh countervailing public interests." *Id.* at 414. The Court emphasized that those interests include the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence," and "the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. The requirement to identify witnesses in pretrial discovery, the Court reasoned, serves to "minimize the risk that fabricated testimony will be believed," *id.* at 413, and protects against undermining "the effectiveness of cross-examination and the ability to adduce rebuttal evidence," *id.* at 415. See also *Michigan* v. *Lucas*, 500 U.S. 145 (1991) (rejecting challenge under Compulsory Process Clause to refusal of trial court to permit rape defendant to testify about his past sexual relationship with the victim as sanction for failing to comply with a state statute requiring pre-trial notice of such testimony).

2. A categorical rule of inadmissibility would conflict with the objective of the Confrontation Clause to promote the truth-seeking function of criminal trials

a. The Court has "interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process." *Craig*, 497 U.S. at 849. And the Court has made clear that the right of cross-examination is "more than a desirable rule of trial procedure." *Chambers*, 410 U.S. at 295. Rather, the "mission" of the Confrontation Clause is "to advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton*, 400 U.S. at 89); see *Craig*, 497 U.S. at 846; *Inadi*, 475

U.S. at 396. The "right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987); see *Lee*, 476 U.S. at 540. Cross-examination advances the truth-seeking function by subjecting the evidence against a defendant "to rigorous testing in the context of an adversary proceeding," thus helping to "ensure [its] reliability." *Craig*, 497 U.S. at 845; see *Lilly*, 527 U.S. at 123-124 (plurality opinion).

Accordingly, both the Confrontation Clause and evidentiary rules allowing for the admission of reliable hearsay serve the same underlying purpose: promoting the accuracy and reliability of the fact-finding process at trial. When the hearsay declarant is unavailable, cross-examination is not an option; instead, the choice is between admitting the hearsay upon a sufficient showing of its reliability or excluding the statement altogether regardless of its probative value. In that situation, admitting reliable hearsay advances the purposes of the Confrontation Clause. Cf. *Inadi*, 475 U.S. at 396 (stating that the admission of the statements of co-conspirators, regardless of the opportunity for cross-examination, "actually furthers the Confrontation Clause's very mission, which is to advance the accuracy of the truth-determining process") (internal quotation marks omitted). Because confrontation rights occasionally must give way even in the service of interests that may compromise the Clause's truth-seeking function, see *Craig*, 497 U.S. at 846-850, 856-857, it follows that those rights also must occasionally give way where the admission of evidence promotes the reliability of the trial.

b. Conversely, the categorical approach urged by petitioner, by excluding from trial even the most reliable and probative testimonial hearsay, would unduly encroach on the truth-seeking function and the associated interest in convicting those guilty of crime. See *Mattox*, 156 U.S. at 243-244 (explaining that an absolute rule of exclusion would produce "a manifest failure of justice" in the case by allowing a guilty defendant to go "scot free" despite the reliability of the hearsay testimony at issue). Moreover, when the out-of-court statement is found to be inherently reliable, admission of the evidence, even without an opportunity for cross-examination, does not infringe the values that the Confrontation Clause is designed to further.[11]

Under this Court's decisions, a finding of inherent reliability requires that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility" —that is, that cross-examination could not plausibly undermine the reliability of the statement. *Wright*, 497 U.S. at 820. As Wigmore explained:

> The theory of the hearsay rule * * * is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought

---

[11] In *Wright*, the Court held that, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its *inherent* trustworthiness, not by reference to other evidence at trial." 497 U.S. at 822 (emphasis added). The Court accordingly rejected the conclusion that corroborating evidence could be used "to support a hearsay statement's 'particularized guarantees of trustworthiness,'" *id.* at 823, and instead, directed attention to "the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief," *id.* at 820.

> to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

5 J. Wigmore, *supra*, § 1420, at 251 (quoted in *Wright*, 497 U.S. at 819); see *Dutton*, 400 U.S. at 89 (plurality opinion) ("[T]he possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal."). Where cross-examination would be "a work of supererogation," refusing admission of the hearsay statement in the name of the Confrontation Clause would subvert the "Clause's very mission—to advance the accuracy of the truth-determining process in criminal trials." *Street*, 471 U.S. at 415 (internal quotation marks omitted); cf. *White*, 502 U.S. at 356-357 ("To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the integrity of the factfinding process.") (internal quotation marks omitted).

c. Testimonial hearsay, like all other hearsay, can be sufficiently reliable in certain situations to warrant its admission into evidence. This Court has frequently upheld the admission of testimonial hearsay that comes in the form of statements in a preliminary hearing or previous trial. See, *e.g.*, *Roberts*, 448 U.S. at 70-73; *Mancusi* v. *Stubbs*, 408 U.S. 204, 213- 216 (1972); *Green*, 399 U.S. at 165-166; *Mattox*, 156 U.S. at 242-244. The Court has explained that result not on the basis that

the confrontation requirement was substantially satisfied by the earlier opportunity to conduct cross-examination, but instead on the basis of the resulting reliability of the statement: "Since there was an adequate opportunity to cross-examine [the witness], and counsel * * * availed himself of that opportunity, the transcript * * * bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" *Mancusi*, 408 U.S. at 216 (quoting *Dutton*, 400 U.S. at 89); see *Roberts*, 448 U.S. at 73.

Other decisions of the Court leave no doubt that testimonial hearsay can carry sufficient indicia of reliability to justify admission even absent a previous opportunity to cross-examine the declarant. In *Lee* v. *Illinois*, *supra*, for example, although the Court found that the presumption of unreliability that attaches to accomplice confessions incriminating the accused had not been rebutted in the circumstances, 476 U.S. at 544, the Court specifically "agree[d] that the presumption may be rebutted" in certain situations, *id.* at 543. In *Lilly* v. *Virginia*, *supra*, similarly, the plurality found that the accomplice confession at issue failed to manifest sufficient indicia of reliability, 527 U.S. at 137-139, but confirmed that such confessions are admissible if "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," *id.* at 136 (quoting *Wright*, 497 U.S. at 820); see *id.* at 134-135 n.5. Four other Justices agreed that the Confrontation Clause imposes no "blanket ban on the government's use of accomplice statements that incriminate a defendant." *Id.* at 143 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 147-148 (Rehnquist,

C.J., concurring in the judgment, joined by O'Connor and Kennedy, JJ.).

In recognizing that even accomplice confessions that inculpate the defendant—a "presumptively suspect" form of hearsay, *Lee*, 476 U.S. at 541—can be found sufficiently reliable to warrant admissibility, the Court necessarily established that there is no cause for applying a per se rule of inadmissibility against testimonial hearsay. Indeed, in other contexts, testimonial hearsay frequently will be far more reliable. For instance, there may often be little reason to question the validity of statements made to officers at the scene by a disinterested bystander who directly observed the commission of a crime and promptly reported it to the police. Even as to accomplice confessions, an accomplice might divulge his own role in a crime without in any way suggesting the involvement of the accused, but in the course of doing so reveal details about the time and place of the offense that, when combined with other evidence, connect the accused to the scene of the crime. If the accomplice is unavailable to testify at trial, his confession, as entirely against his own self-interest, may be sufficiently reliable to warrant admission to establish the time and place of the offense. The per se exclusion of reliable testimonial hearsay in such circumstances, particularly if critical to the government's case, would jeopardize the accuracy and integrity of the fact-finding process.[12]

---

[12] The admission of a particularly reliable hearsay statement does not deprive the defendant of all opportunity to challenge the statement. For example, under Federal Rule of Evidence 806, if hearsay is admitted, the credibility of the hearsay declarant "may be attacked * * * by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." That rule permits the defendant to attempt to cast doubt on the declarant's credibility, motive, memory, or opportunity to observe the events to which the statement relates.

d. None of this is to suggest, of course, that testimonial hearsay may be admitted even where the declarant is available to testify but is not produced for trial. The rule allowing for admission of reliable testimonial hearsay when the declarant is unavailable is one of "necessity." *Roberts*, 448 U.S. at 65. The unavailability of the declarant occasions the need to admit the out-of-court statement to prevent distortion of the truth-seeking process by the exclusion of reliable and probative evidence. See *United States* v. *Scheffer*, 523 U.S. 303, 309 (1998) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial."). If the declarant is available to testify, however, there is no need to admit the out-of-court statement in lieu of live testimony subject to cross-examination.

CONCLUSION

The Court should hold that the Confrontation Clause does not categorically bar the admission of testimonial hearsay.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SRI SRINIVASAN
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

SEPTEMBER 2003